In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	Chapter 11 Case
MILTON J. ARRAS, M. D.	)	
	)	Number 91-20068
Debtor	)	

MEMORANDUM AND ORDER

The debtor-in-possession objected to the claim of Pete Crayton, who filed a claim for damages arising out of the termination of an employment contract. A hearing was held on the objection to Crayton's claim on January 8, 1992. After consideration of the evidence adduced at the hearing, the briefs submitted by the parties, and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Dr. Arras owned and operated a chain of convenience stores in Southeast Georgia known as Jack's Country Malls. Dr. Arras employed Consultant Management Services, Inc. ("CMS, Inc.") to assist him in managing the stores. Dr. Arras and CMS, Inc., entered into a three year consultation agreement on July 10, 1990. The claimant, Pete Crayton, is the assignee of this contract. The contract provides that CMS, Inc., is to be paid

$5,700.00 per month or approximately $68,400.00 per year. Crayton had performed under the contract for approximately three months when he was discharged by Dr. Arras on October 8, 1990.

Crayton owned and operated a chain of convenience stores in Columbia, South Carolina, before coming to Southeast Georgia to work for Dr. Arras. Crayton was in the process of selling those stores during the first few months of his contract with Dr. Arras. Crayton testified that he had to go back to South Carolina frequently to finalize the sale of his former business. Dr. Arras testified that Crayton had a good relationship with the gas suppliers and that Crayton was hired, in part, to help the stores with gas sales. However, Crayton was not empowered to enter into credit arrangements without prior approval.

Crayton testified that his duties were to advise and counsel and to manage the convenience stores. He testified that he made sure the stores were in compliance with codes. Crayton also testified that he was responsible for maintaining books, records, and reports for all the stores. He testified that he created profit and loss statements for the stores. Crayton was also responsible for taking inventory each month.

At the hearing Dr. Arras established clearly that he and Crayton did not get along. Crayton wanted to sell adult magazines at the stores and added such magazines without informing Dr. Arras. After receiving complaints from a local church group, Dr. Arras ordered the magazines removed from the store. Also, Crayton wanted to remove the deli section from some of the stores; an idea opposed by Dr. Arras. Crayton testified that the delis lost money and were not profitable. Dr. Arras testified that the delis were good

traffic builders, which generated other business. Dr. Arras testified that Crayton closed the Racepond store at night although it had always operated twenty-four hours a day. Dr. Arras testified that he disagreed with Crayton and wanted the Racepond store open twenty-four hours. He testified that the store was in a remote location but generated business because it was one of the few stores in the area.

Dr. Arras testified that Crayton had been insubordinate and had been disrespectful to Dr. Arras in public and in front of his employees. Dr. Arras testified that Crayton called him a liar and said he was incompetent. Lynn Weaver an employee hired and trained by Crayton to work at the stores, testified that she had heard Dr. Arras and Crayton raise their voices when arguing about the adult magazines and the delis. Mr. Charles Lampkin, Dr. Arras' former in-house counsel, testified that he overheard heated conversations between Arras and Crayton and heard Crayton curse and call Arras a liar. Dr. Arras testified that he terminated Crayton because of continual arguing concerning the management of the convenience stores and Crayton's failure to use his best efforts to complete the contract. Crayton testified that he thought he had a good relationship with Dr. Arras until the minute he was fired. Crayton further testified that he was currently operating a service station in Jacksonville, Florida, which was not yet profitable, and had not earned income to mitigate his damages.

The consultation agreement may be terminated in accordance with Section "7" as follows:

> . . . for cause or due to the death or disability of

> consultant's designated agent (see paragraph 5, above). For the purposes of this agreement, 'cause' shall be defined as:
>
> (a) the failure of consultant or its designated agent to use its and his best efforts to diligently pursue the duties and obligations described in this agreement;
>
> (b) the theft, embezzlement, misapplication or misappropriation of owner's convenience store property, including the funds and assets of the business; and
>
> (c) the conviction of consultant or its designated agent of any felony or other high crime or misdemeanor involving moral turpitude.

The parties failed to provide any evidence indicating that paragraph 3(b) or (c) are applicable in this case.

Section "4" of the contract provides duties of the parties. The consultant agrees:

> . . . to provide operational skill and expertise . . . to advise and counsel with owner in every aspect of the operation of the said stores . . . to facilitate and to implement all directives and instructions given by owner . . . consultant further agrees that, with the exception of any authority which owner may from time to time grant to it, owner retains all authority in the operation and management of the business . . . consultant . . . shall devote as much of his time as is necessary to assist in the operation and management of the day-to-day affairs of the business . . .

Section "5" of the contract provides that a designated agent shall perform the services under the contract and that the agreement should be deemed in the nature of a

personal services contract. Louis B. Crayton is named as the designated agent. Pete Crayton is the assignee of CMS, Inc., and the party responsible for all services under the contract.

Reference to personal services is found again in Section "11" of the contract which prohibits assignment of the contract. This section provides that the "agreement, being in the nature of a personal services contract, may not be assigned, conveyed or transferred without the prior written approval of the owner."

CONCLUSIONS OF LAW

I. The consultation agreement is a personal services employment contract.

As the duties of the consultant include advising and counseling the owner, the agreement calls for specific personal performance by Crayton and not the mere completion of a specific task or job. The agreement allowed Crayton to spend as much or as little time as he wanted at the stores, but did not state that he would be responsible only for the results produced. The agreement called for Crayton to counsel Dr. Arras as well as run the stores.

Crayton argues that since the contract allowed him to set his own hours that he is an independent contractor not subject to the master servant doctrine. The Georgia Court of Appeals has stated the test for an independent contractor as follows:

> The true test whether a person employed is a servant

> or an independent contractor is whether the employer, under the contract, whether oral or written, has the right to direct the time, the manner, the methods, and the means of the execution of the work, as contradistinguished from the right to insist upon the contractor producing results according to the contract, or whether the contractor in the performance of the work contracted for is free from any control by the employer of the time, manner and method in the performance of the work. [Citations omitted]

Sloan v. Hobbs Sporting Goods Shop, 145 Ga. App. 255, 257, 243 S.E.2d 673 (1978). Although Crayton could control his hours at the stores without direction from Dr. Arras, Crayton was required to meet with Arras and had other duties and obligations to perform. Also, the contract stated that Dr. Arras retained all authority in the operation and management of the business. Clearly, Crayton was subject to some direction from and accountability to Dr. Arras. Crayton was not a mere independent contractor engaged to perform a specific job like a building contractor. Instead, Crayton was to use his personal skills to advise, counsel and consult as well as manage the stores.

Crayton argues that he is an independent contractor under St. Paul Companies v. Capitol Office Supply Company, Inc., 158 Ga. App. 148, 282 S.E.2d 205 (1981) which provides:

> One who carries on an independent business and who contracts with another to perform services for him, being answerable only for the result and not being under the control of his employer as to the time, manner or method of doing the work, is an independent contractor . . .

St. Paul Companies v. Capitol Office Supply Company, Inc., 158 Ga. App. at 748. In this

case the issue was whether an employer would be liable under the *respondeat superior* doctrine for the negligence of a company it hired to demolish a warehouse. The wrecking company hired to do the work informed a nearby property owner to move some poles which would be in the way; however, the property owner failed to move the poles, which were damaged. The court determined that the wrecking company was an independent contractor and that the employer should not be liable. In such a case, the employer hires the company to complete a specific job but does not control the manner in which the work is done. In this case Arras continued in the active supervision of his business, and Crayton, the employee should not be considered an independent contractor but shall be treated as an employee and therefore subject to the master-servant doctrine.

II. Termination for cause.

Crayton argues that he could be fired only for cause as found in the contract. The contract provides for termination for cause when the consultant fails to use best efforts to diligently pursue the duties established in the agreement.

Citing Alonso v. Hospital Authority of Henry County, 175 Ga. App. 198, 201, 332 S.E.2d 884 (1985), Crayton argues that his contract could be terminated only for causes specifically listed. In Alonso, the court concluded that an objective standard of cause for termination should be applied as the agreement failed to define just cause, but suggested that if a contract defines just cause only that cause specified in the contract will be considered sufficient for termination. Although this portion of the Court of Appeals opinion may be dicta, as indicated by the parties, I am persuaded by the Court's reasoning.

Despite the inability of Dr. Arras and Crayton to get along, Crayton did perform his obligations under the contract. He attempted to improve the profitability of the company, although many of his decisions were not looked upon favorably by Dr. Arras. Nevertheless, while in some cases he acted without Arras' prior approval, he never countermanded a decision communicated by Arras. He argued, and was disrespectful, but he did not violate the express requirements of paragraph four.

Dr. Arras argues that under the master-servant doctrine, the contract has an implied term on the part of the employee to obey the reasonable orders of the employer and to treat the employer with respect, citing Parker v. Farlinger, 122 Ga. 315, 50 S.E. 98 (1905). In Parker, the employee was hired as manager of the employer's apartment house. The employee had a dispute with a guest, and both persons went to talk to the employer about the problem. A dispute arose between the employee and employer. The employee became insubordinate and disrespectful to the employer, calling him two-faced and criticizing him. Subsequently, the employer fired the employee. The Supreme Court referred to the employee's "contract of employment" but failed to state whether the contract was oral or written. Certainly, the Court did not refer to a written contract defining just cause for termination as in the present case. The Supreme Court discussed the implied obligation of the servant to obey all reasonable commands of the master and to be respectful to the employer and concluded that the plaintiff was rightfully discharged and was not entitled to recover from his employer. Parker, 122 Ga. at 317.

Parker is not applicable here as Crayton's employment contract specifically defines cause for termination. *See* Baker v. Penn. Mutual Life Ins. Co., 788 F.2d 650, 657

(10th Cir. 1986). Where a contract defines cause for termination, the employer should be allowed to terminate an employee only for cause specified. *See* Newcomb v. Imperial Life Ins. Co., 51 F. 725 (CC Mo. 1892) (Where the parties have stated (in a written contract) what should be deemed a sufficient cause for terminating the agency, an implication arises that it can only be lawfully terminated for one of the specified causes, or by mutual consent). This is all the more true in this case where the contract was drafted by Arras' counsel, and under general principles of contract interpretation, all ambiguities are to be resolved against that party. *See* Restatement, Second, Contracts §206.

I conclude that Dr. Arras should be bound by the terms of his contract, which failed to provide for termination due to insubordination. As Crayton was not terminated for failure to use his "best efforts" and was therefore not fired for cause as defined in the agreement, he has a valid claim for damages arising from the termination of his employment contract. This claim is governed by 11 U.S.C. Section 502(b)(7) which limits the claim for damages resulting from termination of an employment contract to one year of compensation. Therefore, Pete Crayton should be allowed an unsecured claim for $68,400.00.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Pete Crayton should be allowed an unsecured claim of $68,400.00 in this Chapter 11 case.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of March, 1992.